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ADOPTED CHILD AS "HEIR"

In the recent case of *Major v. Kammer*¹ the testator left a will, probated May 2, 1904, which provided:

. . . I do hereby give and bequeath . . . to the Louisville Trust Company for the use and benefit of Jennie Farrell, during her life, with remainder to her heirs at law; the income from said property to be paid to said Jennie Farrell.²

Jennie Farrell, the life beneficiary died on February 9, 1952, leaving as her heirs a natural daughter and two daughters who were adopted on October 27, 1936. The question presented to the court was whether a devise to one for life with remainder to the heirs at law of the life beneficiary includes children adopted by the life beneficiary subsequent to the testator's death. The court in a very able opinion held that the adopted children were within the class designated as "heirs at law."

In reaching this decision the court had to decide whether the 1904 adoption statute³ in effect at the testator's death, or the 1950 statute⁴ in effect at the death of the life tenant should control.

In the past, adopted children have met with much difficulty in qualifying as "heirs" under a will limited to the "heirs of the adoptive parents." Much of this difficulty stemmed from the 1904 adoption statute which provided:

Any person twenty-one years of age, may, by petition filed in the circuit court of the county of his residence, state, in substance, that he is desirous of adopting a person, and making him capable of inheriting as heir-at-law of such petitioner; and said court shall have authority to make an order declaring such person heir-at-law of such petitioner, and as such, capable of inheriting as though such person were the child of such petitioner; but no such order shall be made if the petitioner be a married man or woman, unless the husband or wife join in the petition.

Under this statute the court would have had to face the further problem of choosing between two contrary rules of construction for determining the intention of the testator when he made the devise.

The first rule, which appears in the earlier Kentucky cases, is that adopted children cannot take property limited by deed or will to the heirs of the adoptive parents, unless an intention to include them appears from the language of the instrument.⁵ It seems perfectly clear

¹ 258 S.W. 2d 506 (Ky. 1953).

² *Ibid.*

³ CARROLL'S KY. STAT. sec. 2071 (1904).

⁴ KY. REV. STAT. 199.530 (1953).

⁵ *Eversole v. Ky. River Coal Corp.*, 298 Ky. 321, 182 S.W. 2d. 392 (1944); *Woods v. Crump*, 283 Ky. 675, 142 S.W. 2d. 680 (1940).

that under this interpretation it would be impossible for a subsequently adopted child to be included within the class unless the testator specifically so provided.

A second rule later announced in the case of *Isaacs v. Manning*,⁶ was to the effect that an adopted child clearly falls within the description "heirs" where no language showing a contrary intention appears from the instrument. The court did not, however, overrule the previous cases which were decided in the light of the first rule of construction. This was probably due to the fact that the cases could be distinguished, in that all the cases applying the first rule involved adoptions subsequent to the testator's death, while the adoption in the *Manning* case took place prior to the death of the testator and the drawing of the will. These cases have been so distinguished in a note in the *Kentucky Law Journal*.⁷

This 1904 statute was repealed in 1940,⁸ but its repeal did not prevent it from fixing the rights of adopted children, because the Court of Appeals had been of the opinion that the statute in effect at the death of the testator would be the one by which the will would be construed. Therefore, when a case was presented where the testator died prior to 1940 and the life tenant died after this date, the 1904 statute would be applied. The *Manning* case was decided after the repeal of the 1904 statute. There, however, the court, refusing to follow such an artificial construction of the word "heirs," took a more liberal attitude than it had in the earlier cases, and announced the second rule of construction, as stated above.

The 1950 statute in effect today is for all practical purposes the same as the repealing statute of 1940 and the 1946 enactment on adoption. It provides:

Any child adopted pursuant to the provision of K.R.S. 199.470 to 199.520 shall be considered, for the purpose of inheritance and succession and for all other legal considerations, the natural, legitimate child of the parents adopting it. . . .⁹

In the case of *Kolb v. Ruhl's Adm'r*,¹⁰ decided under the 1940 enactment, it was held that a child adopted in 1930 could inherit from the cousin of the adoptive parents where the cousin died in 1945. This was an indication that adopted children were to be the same as

⁶ 312 Ky. 326, 227 S.W. 2d 418 (1950).

⁷ Note, 39 Ky. L. J. 335 (1951).

⁸ CARROLL'S KY. STAT. sec. 2071-2072b, repealed in 1940; KY. REV. STAT. sections 405.140-405.240, provisions for adoption, repealed in 1946; KY. REV. STAT. sections 405.240-405.280, provisions for adoption, repealed in 1950, effective June 15, 1950; KY. REV. STAT. sections 199.470-199.590, adopted in 1950, effective June 15, 1950.

⁹ KY. REV. STAT. 199.530 (1) (1953).

¹⁰ 303 Ky. 604, 198 S.W. 2d 326 (1946).

natural children and would be classed with them unless by will or some other instrument they were excluded. In the principal case, the court stated that the 1950 statute, if it were used to determine the intention of the testator, would allow adopted children to be included within the term "heirs-at-law" of the adoptive parents.

It was contended, however, that since the testator died in 1904, the holding in *Copeland v. State Bank & Trust Co.*¹¹ controlled the principal case, and the statute in effect at the testator's death should be used to determine membership in the class described as "heirs." The court, however, refused to follow this part of the *Copeland*¹² opinion, and held that in determining membership in the class described as "heirs" of the life tenant, the statute in effect at the death of the life tenant would control. Therefore, since the life tenant in the principal case died in 1952, the 1950 statute, in effect at her death, was used to construe the will, and the adopted children were allowed to share in the property left by the testator. By the specific holding in the principal case the court was not compelled to use the 1904 statute and its opposing rules of construction.

The case represents an important clarification on the status of adopted children, in accepting what is believed to be the preferable definition of the terms "heirs" and "heirs-at-law" as including adopted children. It would now seem that the 1904 statute with its contrary rules of construction is at long last dead. No longer can it plague the adopted child as it has since its enactment, and no longer will it rule from the grave as it has since its repeal.

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TESTAMENTARY GIFTS TO AMENDABLE TRUSTS

The question of whether a testator can ever devise or bequeath a portion of his estate to an amendable inter vivos trust is not one that can be readily and conclusively answered. When the bequest is to an amendable trust which has in fact been amended subsequent to the execution of the will, a further and even more perplexing problem arises. No American jurisdiction has as yet allowed property to pass into a trust which has been amended after the execution of the will, unless such amendments meet the formal requirements of the Statute of Wills. It has been suggested that perhaps the law in this respect should be changed by passing a statute allowing a formally executed

¹¹ 300 Ky. 432, 188 S.W. 2d 1017 (1945).

¹² *Supra* note 1 at 508.